

# Law Revision Commission of the State of New York Its Organization Procedure Program and Accomplishment

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### Recommended Citation

John W. MacDonald and Simon Rosenzweig, *Law Revision Commission of the State of New York Its Organization Procedure Program and Accomplishment*, 20 Cornell L. Rev. 415 (1935)

Available at: <http://scholarship.law.cornell.edu/clr/vol20/iss4/1>

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# CORNELL LAW QUARTERLY

VOLUME XX

JUNE, 1935

NUMBER 4

## THE LAW REVISION COMMISSION OF THE STATE OF NEW YORK: ITS ORGANIZATION, PROCE- DURE, PROGRAM AND ACCOMPLISHMENT

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### I

#### ORGANIZATION AND WORK

The Law Revision Commission of the State of New York has been characterized as "a pioneer juristic venture".<sup>1</sup> Created by Chapter 597 of the Laws of 1934, the Commission was charged with the following duties:

"1) To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

"2) To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association, or other learned bodies.

"3) To receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

"4) To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

"5) To report its proceedings annually to the legislature on or before February first, and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations."

The statute creating the commission was the result of a proposal by the Commission on the Administration of Justice,<sup>2</sup> which in its 1934 report to the Legislature wrote:<sup>3</sup>

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<sup>1</sup>Laube, Book Review (1935) 20 CORNELL LAW QUARTERLY 403.

<sup>2</sup>This commission was created by the legislature "to investigate and collect facts relating to the present administration of justice in the state" by L. 1931, c. 186; continued by L. 1932, c. 508; L. 1933, c. 28, 261; L. 1934, c. 29; L. 1935, c. 58. See N. Y. LEG. DOC. (1934) No. 50. See also editorials N. Y. L. J. Dec. 14, 15, 1934 at 2372, 2398.

<sup>3</sup>N. Y. LEG. DOC. (1934) No. 50, p. 57.

"Assuming that all our present problems are quickly solved it is certain that new problems will arise from time to time which will be just as pressing as those which now beset us. To the orderly examination of both types, our proposals for a Judicial Council and for a Law Revision Commission are admirably adapted. We commend these devices to the Legislature in the belief that if they are adopted, maladjustments in the administration of justice and in our system of law generally, will henceforth be far less likely to reach the critical state."

The genealogy of the Law Revision Commission has already been the subject of discussion.<sup>4</sup> The concern of the present article is not the history of the proposals<sup>5</sup> leading up to the creation of the Commission. Our purpose is to trace the development of the work of the Law Revision Commission since its organization, and to discuss the accomplishments of the Commission during its first legislative year.

The Commission has been set up as part of the legislative branch of the government.<sup>6</sup> As an advisor to the Legislature, the Commission must investigate the New York law to discover inequitable and anachronistic rules. It has had the advantage of having as *ex officio* members the chairmen of the Judiciary Committees of the Senate and Assembly, who have effectively sponsored its proposals in committee and on the floor. The members of the Legislature have given careful consideration to the recommendations and studies put at their disposal by the Commission and have, on the whole, shown approval of the Commission's work.

The Commission has centralized its research activities at its headquarters under the supervision of its director of research. When a problem is undertaken for study, it is assigned as a project to a subcommittee of the Commission. Upon completion of a project, the subcommittee reports to the Commission. After consideration and final action, the subcommittee is discharged.

An important standing committee, created to receive and consider suggestions for future study, is the committee on projects. Nearly two hundred suggestions for reform in the New York law have been received from judges, lawyers, public officials, interested groups, and laymen.<sup>7</sup> Members of law faculties, the reporters and annotators of the American Law Institute, and the Commissioners on Uniform

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<sup>4</sup>See (1934) 20 CORNELL LAW QUARTERLY 119; (1935) 4 FORDHAM L. REV. 102.

<sup>5</sup>Particularly important is the article: Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113.

<sup>6</sup>L. 1934, c. 597; N. Y. LEGISLATIVE LAW, Article 4a, §§ 70-72.

<sup>7</sup>N. Y. LEG. DOC. (1935) No. 60, p. 8. Since the date of this report, February 1, 1935, the number of suggestions has almost doubled.

State Laws have also suggested projects.<sup>8</sup> The Commission itself has undertaken several exploratory studies from which fruitful projects have resulted.<sup>9</sup> A thorough examination of the reports of the New York courts is in progress to disclose opinions in which courts have adhered to precedent reluctantly.<sup>10</sup> As the Commission itself has written:<sup>11</sup>

"The Commission is examining the case law of the State in search of judicial evidence as to defects and anachronisms. A survey of the working of existing rules of law is an essential part of its program as a continuing body serving the Legislature in an advisory capacity. There are many situations where the administration of justice is impeded by the existence of laws ill fitted to modern conditions, causing a discontent, which often has no organ for its expression. The Commission is not only responsive to suggestions which are brought to its attention but is setting itself the task of studying the needs which have not yet become articulate."

The Commission organized in the summer of 1934.<sup>12</sup> By early fall, a research staff had been set up, and a program of research undertaken. In February, 1935, thirteen bills<sup>13</sup> were ready for introduction into

<sup>8</sup>N. Y. LEG. DOC. (1935) No. 60, pp. 8-9.

<sup>9</sup>N. Y. LEG. DOC. (1935) No. 60, p. 15. This is directed by N. Y. LEGISLATIVE LAW § 72 (1).

<sup>10</sup>N. Y. LEG. DOC. (1935) No. 60, p. 8. The report of the Commission states: "Chief Judge Pound of the Court of Appeals suggested an examination of the recent Court of Appeals reports during the last quarter century for the purpose of discovering cases in which the Court exhibited a reluctance to follow the precedent." See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) Lecture IV, *Adherence to Precedent*; Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113, 117 *et seq.*

<sup>11</sup>N. Y. LEG. DOC. (1935) No. 60, p. 15.

<sup>12</sup>The Governor appointed the members of the Commission on July 6, 1934. See N. Y. LEG. DOC. (1935) No. 60, p. 1.

<sup>13</sup>(1935) Sen. Int. No. 1237, Pr. No. 1400, Ass. Int. No. 1585, Pr. No. 1731; (1935) Sen. Int. No. 1236, Pr. No. 1399, Ass. Int. No. 1584, Pr. No. 1730; (1935) Sen. Int. No. 1429, Pr. No. 1640, Ass. Int. No. 1912, Pr. No. 2131; (1935) Sen. Int. No. 1238, Pr. No. 1401, Ass. Int. No. 1586, Pr. No. 1732; (1935) Sen. Int. No. 1423, Pr. No. 1634, Ass. Int. No. 1878, Pr. No. 2089; (1935) Sen. Int. No. 1422, Pr. No. 1633, Ass. Int. No. 1879, Pr. No. 2090, 2759; (1935) Sen. Int. No. 1439, Pr. No. 1641, Ass. Int. No. 1915, Pr. No. 2134; (1935) Sen. Int. No. 1598, Pr. No. 1868, Ass. Int. No. 2514, Pr. No. 2177; (1935) Sen. Int. No. 1425, Pr. No. 1636, Ass. Int. No. 1914, Pr. No. 2133; (1935) Sen. Int. No. 1428, Pr. No. 1639, Ass. Int. No. 1910, Pr. No. 2129; (1935) Sen. Int. No. 1427, Pr. No. 1638, Ass. Int. No. 1913, Pr. No. 2132; (1935) Sen. Int. No. 1426, Pr. No. 1637, Ass. Int. No. 1911, Pr. No. 2130; (1935) Sen. Int. No. 1539, Pr. No. 1771, Ass. Int. No. 1909, Pr. No. 2128.

the Legislature. Of these, eleven passed both houses,<sup>14</sup> and all thirteen passed the Senate. In three instances, the study of the Commission disclosed situations which the Commission felt required no change in the New York law at this time.<sup>15</sup> The Commission also made three important recommendations directly to the Governor at his request.<sup>16</sup>

To facilitate its work, the Commission has adopted the medium of a calendar, the following formula being used:

1. *Immediate study.* Projects being studied by the Commission;
2. *Preferred list.* Subjects suggested to the Commission which are thought suitable for future study;
3. *Reserved list.* Subjects suggested to the Commission on which no action negative or affirmative has been taken.<sup>17</sup>

In accordance with this formula immediate study was begun on the following projects:<sup>18</sup>

1. Contribution between joint tort feorsors.
2. Survival of tort actions after the death of plaintiff or defendant.
3. Expert witnesses.
4. Statutes of Limitations.
5. Revision of the Penal Law.
6. The commutation-compensation provisions of the Correction Law.
7. Law relating to perjury.
8. Law of contracts relating to consideration and the effect of the seal.
9. Liability of tort feorsors for injuries to unborn children.
10. Imputation of a parent's or custodian's contributory negligence to an infant plaintiff.
11. Amendments to the Sales Act proposed by the Commissioners on Uniform State Laws relating to the negotiability of documents of title.
12. Definition of "value" in the Sales Act and Bills of Lading Act.
13. Method of valuation of a widow's share of realty under section 83 of the Decedent Estate Law.

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<sup>14</sup>All except (1935) Sen. Int. No. 1430, Pr. No. 1641, Ass. Int. No. 1915, Pr. No. 2134; and (1935) Sen. Int. No. 1426, Pr. No. 1637, Ass. Int. No. 1911, Pr. No. 2130. These two bills passed the Senate.

<sup>15</sup>See N. Y. LEG. DOC. (1935) No. 60 (G), pp. 87-104 and N. Y. LEG. DOC. (1935) No. 60 (J). *Infra* notes 114-118.

<sup>16</sup>*Infra* notes 125-133.

<sup>17</sup>N. Y. LEG. DOC. (1935) No. 60, p. 10.

<sup>18</sup>N. Y. LEG. DOC. (1935) No. 60, pp. 10-11, which contains a list of projects on the "immediate study" calendar as of the date of that report; subjects numbered 16 and 17 in the list were undertaken after the submission of the first annual report.

14. Criminal extradition.
15. Six projects in the law of real property dealing with:
  - a. Power of a life tenant or trustee to sell, mortgage, or lease a fee.
  - b. Statute allowing treble damages for waste.
  - c. Doctrine of incorporation by reference in the law of wills.
  - d. Implication of cross remainders in conveyances by will and by deed.
  - e. A procedure for the recovery of damages to realty in which there are possessory interests and future interests.
  - f. Ability of the owner of a present possessory interest to "change" the premises against the objection of an owner of a future interest.
16. The proposed amendments to section 722 of the Penal Law, popularly known as the Public Enemy Act.
17. The revision of the procedure for the appointment of lunacy commissions in criminal cases.

Obviously, work on all of these topics could not be completed for the 1935 Legislature. Indeed, some were deemed to be matters which could only be completed after long study. Of the subjects enumerated above, inquiry is being continued as to contribution among joint tortfeasors, expert witnesses, the statutes of limitations, consideration and the seal, and the revision of the Penal Law.

## II

### THE 1935 LEGISLATIVE PROGRAM

#### *Survival of Tort Actions*<sup>19</sup>

At the very outset, the topic of survival of tort actions was considered by the Law Revision Commission at the request of the Commission on the Administration of Justice.<sup>20</sup> The maxim "*actio personalis moritur cum persona*" has been "characterized as barbarous by Sir Frederick Pollock and has been tolerated in modern times only because it has been abolished in all fields of the law except that of personal injury."<sup>21</sup> At common law generally, causes of action in contract

<sup>19</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (E).

<sup>20</sup>N. Y. LEG. DOC. (1935) No. 60, p. 13. The Commission on the Administration of Justice had recommended (1934) Sen. Int. No. 1788, Pr. No. 2126, which failed of enactment. That Commission joined in recommending the Law Revision Commission bill to the 1935 legislature, *infra* note 38.

<sup>21</sup>N. Y. LEG. DOC. (1935) No. 60 (E) p. 3. See POLLOCK ON TORTS (13th ed. 1929) 68; note (1928) 13 CORNELL LAW QUARTERLY 596, 602.

survived and causes of action in tort died.<sup>22</sup> Since 1828, the statutes of New York have provided for the survival of all contract actions<sup>23</sup> and of tort actions for injuries to property rights.<sup>24</sup> In 1847, a cause of action for wrongful death was created in favor of the next of kin.<sup>25</sup> No action for personal injuries, however, survived either in favor of the injured plaintiff's estate or against the estate of the deceased wrongdoer.<sup>26</sup>

The problem of changing the New York law resolved itself into two questions: Should an action for personal injuries survive against the estate of a deceased wrongdoer? Should an action for personal injuries survive in favor of the estate of a deceased injured party?

Perhaps the more obvious injustice arose through the operation of the New York law which abated actions for personal injuries when the wrongdoer died. The frequency of mortalities in automobile accidents is notorious. When it is considered that in many cases the very fatality to the negligent person prevents any recovery by the wronged person, the injustice of the rule is apparent. The injustice of the rule by which causes of action abated by reason of plaintiff's death was mitigated by Lord Campbell's Act.<sup>26a</sup> When the injured person died not as a result of the injury itself, his cause of action for personal injuries died with him.

The Commission, therefore, decided that the common law rule of abatement should be abolished. Great care, however, was necessary to prevent a double recovery, first, for the unabated cause of action for personal injuries, and second, for the cause of action given to the next of kin under Lord Campbell's Act. A solution might have been the requirement of an election between the cause of action for injury and that for wrongful death. But such course might have met with difficulties because of the express protection afforded the cause of action for death by the New York Constitution.<sup>27</sup>

Of course, it should be remembered that, in actions brought under

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<sup>22</sup>N. Y. LEG. DOC. (1935) No. 60 (E), pp. 16-24; note (1928) 13 CORNELL LAW QUARTERLY 596; *Hegerich v. Keddie*, 99 N. Y. 258, 259 (1885); 2 CARMODY, NEW YORK PRACTICE (1930) § 762.

<sup>23</sup>N. Y. REV. STAT. (1838) pt. 2, c. 6, tit. 5, § 2. See N. Y. LEG. DOC. (1935) No. 60 (E), p. 24.

<sup>24</sup>N. Y. REV. STAT. (1838) pt. 2, c. 6, tit. 5, § 5. See also N. Y. REV. STAT. (1838) pt. 3, c. 8, tit. 3, §§ 1, 2. See N. Y. LEG. DOC. (1935) No. 60 (E), p. 24.

<sup>25</sup>L. 1847, c. 450, §§ 1, 2.

<sup>26</sup>N. Y. LEG. DOC. No. 60 (E), pp. 3, 24-40.

<sup>26a</sup>N. Y. DEC. EST. LAW § 130 *et seq.*

<sup>27</sup>N. Y. CONST. Art. I, § 18: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

the wrongful death statute, the proper parties plaintiff are the next of kin;<sup>28</sup> the benefits of any recovery are preserved for their personal use.<sup>29</sup> On the other hand, under the usual survival statutes, the proper party plaintiff is the estate of the deceased,<sup>30</sup> and the benefits of any recovery, subject to the claims of creditors, are distributed in the same manner as other assets of the estate.<sup>31</sup> Moreover, in death actions, the measure of damages is pecuniary loss to the next of kin, while under a survival statute, recovery usually has a broader scope.<sup>32</sup> The Commission, leaving the wrongful death statutes unchanged, met the possibility of a double recovery by providing that if the injury causes death, recovery by reason of the survival statute shall be limited to the damages accruing before death.<sup>33</sup>

Thus the Commission determined that public policy required the survival of causes of action regardless of whether the injured party or the wrongdoer died. As a consequence, when it drafted its bill, the Commission provided that the cause of action for personal injuries should survive the death of the negligent party; it also provided that the cause of action, limited to damages accruing to deceased before death,<sup>34</sup> should survive in favor of the decedent's estate. It also provided that no cause of action for damages caused by an injury to a third person<sup>35</sup> should be lost because of the death of a third person.<sup>36</sup>

The principal terms of the Commission's revised bill,<sup>37</sup> which be-

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<sup>28</sup>N. Y. DEC. EST. LAW § 130.

<sup>29</sup>N. Y. DEC. EST. LAW § 133. See note (1902) 15 HARV. L. REV. 854.

<sup>30</sup>Schumacher, *Rights of Action under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 116. Note (1931) 44 HARV. L. REV. 980, 982-983.

<sup>31</sup>*Supra* note 30.

<sup>32</sup>N. Y. DEC. EST. LAW § 132. See editorials, *Elements of Damage in Death Action*, N. Y. L. J., Feb. 6, 7, 1935 at 656, 680. It should be noted that by L. 1935, c. 224, the scope of recovery in death actions was extended to include funeral and medical expenses.

<sup>33</sup>N. Y. LEG. DOC. (1935) No. 60 (E), pp. 8-9. Thus the estate of the injured party may recover for medical expenses, loss of wages, and damages for pain and suffering, etc., accruing before death.

<sup>34</sup>*Supra* note 33.

<sup>35</sup>A common situation in which this principle would operate is the action brought by parent or husband for loss of services, etc., in cases of personal injury.

<sup>36</sup>N. Y. LEG. DOC. (1935) 60 (E) p. 6.

<sup>37</sup>As originally introduced in the Legislature, the bill proposed by the Law Revision Commission excluded generally from its survival provisions causes of action for breach of promise to marry, seduction, alienation of affections, and criminal conversation. The tripartite nature (e. g. in seduction, the parent, daughter and seducer) of seduction, alienation of affections and criminal conversation raised the question of whether the death of the third person not a party to the suit should cause the action to abate. The Commission thought that as a general matter no cause of action for damages caused by an injury to a third person



came law, merit quotation.<sup>38</sup> As a substitute for section 118 of the Decedent Estate Law, a new section was framed to read as follows:

*"Actions against executors or administrators for injury to person or property.* No cause of action for injury to person or property shall be lost because of the death of the person liable for the injury. For any injury an action may be brought or continued against the executor or administrator of the deceased person, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. This section shall extend to a cause of action for wrongfully causing death and an action therefor may be brought or continued against the executor or administrator of the person liable therefor."

The new section 119 of the Decedent Estate Law reads as follows:

*"Actions by executors or administrators for injury to person or property.* No cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the executor or administrator of the deceased person, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. No cause of action for damages caused by an injury to a third person shall be lost because of the death of the third person."

The substitute section 120 of the Decedent Estate Law provides:

*"Limitations upon recovery where injury causes death.* Where an injury causes the death of a person the damages recoverable for such injury shall be limited to those accruing before death, and shall not include damages for or by reason of death. The damages recovered shall form part of the estate of the deceased.

"Nothing herein contained shall affect the cause of action existing in favor of the next of kin under section one hundred and thirty of this chapter. Such cause of action and the cause of action in favor of the estate to recover damages accruing before death may be prosecuted to judgment in a single action; a separate verdict, report or decision shall be rendered as to each cause of action.

"Where an action to recover damages for personal injury has been brought, and the injured person dies before verdict, report

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should be lost because of the death of the third person. (*Supra* note 36.) In accordance with this determination of policy, it was provided, even in the case of these otherwise disfavored actions, that the cause of action should not abate by reason of the death of the third person. When the McNaboe bill (L. 1935, c. 263) abolishing these actions became law, the Commission's bill was amended in the legislature so as to omit all express reference to these actions.

<sup>38</sup>Ass. Int. No. 1878, Pr. No. 2089, passed Assembly March 14, 1935, amended in Senate April 10, 1935, amendments concurred in by Assembly April 11, 1935. Approved by the Governor May 8, 1935 as L. 1935, c. 795.

or decision and his death is due to the injury, his executor or administrator may enlarge the complaint in such action to include the cause of action for wrongful death pursuant to section one hundred and thirty of this chapter.

"Where an action to recover damages for personal injury sustained before the death of the injured person and a separate action for wrongful death pursuant to section one hundred and thirty of this chapter are pending against the same defendant, they may be consolidated on motion of either party."

Finally,<sup>39</sup> section 89 of the Civil Practice Act was reframed as follows:

*"Non-abatement after verdict, report or decision.* After verdict, report or decision in an action to recover damages upon a cause of action which does not survive the death of a party, the action does not abate by the death of either party, but the subsequent proceedings are the same as in a case where the cause of action survives. In case said verdict, report or decision is reversed, said action does not abate by the death of either party, but no punitive damages shall be awarded nor penalties adjudged in any subsequent new trial."

#### *The Law Relating to Perjury*<sup>40</sup>

Another problem which the Commission considered was the necessity for revising the perjury statutes. The breakdown in the enforcement of the law against perjury had become notorious. For many years, remedial bills had been introduced into the Legislature. The Commission on the Administration of Justice considered this question as one of its major problems, and framed bills aiming to correct the shortcomings of the law.<sup>41</sup> These proposals failed of enactment. Nevertheless, the urgency of remedying a vicious defect in the law

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<sup>39</sup>Other changes were made in § 109 of the INSURANCE LAW and § 94 (k) of the VEHICLE AND TRAFFIC LAW. These changes were made for the purpose of assuring the inclusion in insurance policies of provisions whereby the death of assured would not release the company from liability to the assured or the injured person.

<sup>40</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (F).

<sup>41</sup>(1934) Sen. Int. No. 463, Pr. No. 476. The features of this bill were: two degrees of perjury were created; first degree perjury was a felony and consisted of a material false swearing in a felony prosecution; second degree perjury was a misdemeanor and consisted of any other false swearing, whether material or not. This bill was not reported out of the Senate Committee on Codes. Also (1934) Sen. Int. No. 464, Pr. No. 477 would have empowered courts of record to punish perjury as contempt of court. This bill passed the Senate, but was not reported out of the Assembly Judiciary Committee. Note, however, that L. 1935, c. 760, enacting a new article 45 of the CIVIL PRACTICE ACT, with regard to supplementary proceedings, in section 788, makes material false swearing therein punishable as a civil contempt of court.

remained. The sanctity of the oath is a pillar of the administration of justice. Widespread prevalence of false swearing in judicial proceedings is a serious threat. Recognizing the vital importance of this problem the Law Revision Commission undertook the study of perjury.

One of the chief obstacles to the successful enforcement of the law was the requirement that false swearing, to constitute perjury, must relate to a "material matter".<sup>42</sup> This requirement seems to have crept into the law through a misconception first engendered by Lord Coke,<sup>43</sup> and was subsequently introduced into the New York statute.<sup>44</sup> Although in England the courts had largely whittled away the requirement of materiality, judicial decision in this state continued to give vitality to this technicality. The case of *People v. Teal*<sup>45</sup> gave the word "material" such wide interpretation as to make proof of any charge of perjury difficult,<sup>46</sup> and notwithstanding that later decisions of the Court of Appeals in time<sup>47</sup> departed from the rule of the *Teal*

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<sup>42</sup>N. Y. PENAL LAW § 1620; N. Y. LEG. DOC. (1935) No. 60 (F), pp. 43 *et seq.*

<sup>43</sup>N. Y. LEG. DOC. (1935) No. 60 (F), pp. 9-23. Perhaps the basis of this misconception was the fact that originally the theory of the statute of Elizabeth (5 Eliz. c. 9) showed an intention to make amends to the person injured by the perjury. Thus if no one was grieved, the perjury was not "material" in the sense of "substantial" and was thought not to be a crime. Logically, if a false swearing caused no damage, it was, in that sense, immaterial. When the conception of criminal law broadened so that the protection of the public rather than private retribution became its principal aim, the origin of the element of materiality was forgotten.

<sup>44</sup>*Supra* note 42.

<sup>45</sup>196 N. Y. 372 (1909).

<sup>46</sup>*Teal* was indicted for an attempt to suborn perjury in a divorce action, the complaint in which charged adultery in Canada in 1905. *Teal* attempted to procure a witness to swear to the commission of adultery in New York in 1908. In reversing the conviction, the Court of Appeals, by a four to three decision, held:

"Thus we see that the traversable issue of record was whether Gould had committed adultery in a Canadian brothel in 1905, and that the false testimony solicited from MacCauslan was designed to show a separate and distinct act of adultery not referred to in the complaint, committed by Gould in the city of New York in the year 1908. The bare statement of these facts, unrelated both in pleading and in circumstance, is sufficient to draw attention sharply to the utter irrelevancy, incompetency and immateriality of the false testimony solicited, to the issue tendered by the complaint in *Gould v. Gould* . . .

"From time immemorial the common law has made the materiality of false testimony an essential ingredient of the crime of perjury. From their earliest beginnings our statutes have always embodied that rule. Our penal laws, but recently recodified, have continued it. That, in short, is the unquestioned law of this state. (Penal Code, sec. 96; Penal Law, sec. 1620). The language of the statute is that a person who wilfully and knowingly testifies falsely, *in any material matter*, is guilty of perjury." (Italics court's).

<sup>47</sup>N. Y. LEG. DOC. (1935) No. 60 (F), pp. 47-52.

case, the lower courts continued to give broad application to the term.<sup>48</sup>

Another cause for the breakdown in the enforcement of the law against perjury was the possibility of disproportionate punishment under the Penal Law.<sup>49</sup>

Accordingly, the Commission framed the bill, now the law,<sup>50</sup> by which perjury is defined:

"§ 1620. *Perjury defined.* A person is guilty of perjury who 1. Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, in, or in connection with, any action or special proceeding, hearing or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false; or

"2. Swears or affirms that any deposition, certificate, affidavit or other writing by him subscribed, is true, and which contains any matter which he knows to be false affecting the title to any real or personal property, including the assignment or satisfaction of a mortgage, and upon which reliance is placed; or

"3. Having been appointed or designated to be an interpreter in any judicial action or proceeding knowingly and wilfully falsely interprets any material evidence, matter or thing between a witness and the court or a justice thereof in the course of an action or special proceeding."

The new statute created two degrees of perjury. Perjury in the first degree is defined:

"A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered."

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<sup>48</sup>N. Y. LEG. DOC. (1935) No. 60 (F), pp. 52-57.

<sup>49</sup>The maximum penalty under the statute was twenty years. N. Y. PENAL LAW §.1633, before amendment, *supra* note 46. "Crimes are more effectively prevented by the *certainly* than the severity of punishment." BECARRIA, AN ESSAY ON CRIMES AND PUNISHMENT (2nd American ed. 1819) c. 27, entitled *Of the Mildness of Punishments*, p. 93.

<sup>50</sup>(1935) Ass. Int. No. 1879, Pr. No. 2090, 2759, passed Assembly March 27, 1935, passed Senate March 27, 1935, approved by the Governor April 30, 1935 as L. 1935, c. 632.

Perjury in the second degree is defined as follows:

"Perjury in the second degree. A person is guilty of perjury in the second degree who commits perjury under circumstances not amounting to perjury in the first degree."

Similar changes were made with regard to the definition of the crime of subornation of perjury.<sup>51</sup> Both degrees of perjury and subornation of perjury are made felonies.<sup>52</sup> Thus, both degrees of the crime are triable by jury in all parts of the state. It is also possible for a jury upon an indictment for first degree perjury to convict for the lesser offense.<sup>53</sup>

A comparison of the new statute with the old reveals that the definition of *perjury in the first degree* is substantially the same as the former definition of *perjury*. Perjury in the second degree, under the new statute, is, however, a redefinition of the crime with the element of materiality omitted. Another important change is the drastic reduction of penalties. Instead of the maximum term of imprisonment of twenty years under the old statute, the maximum penalty for first degree perjury is now only two years imprisonment or \$5,000 fine or both.<sup>54</sup>

*Amendments to the Sales Act to Give Full Negotiability to Documents of Title*<sup>55</sup>

The Conference of Commissioners on Uniform State Laws, in proposing the Sales Act, incorporated a rule of limited negotiability for documents of title.<sup>56</sup> The Uniform Sales Act as enacted in New York provided that:

"the validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress."<sup>57</sup>

On June 6, 1911, New York adopted the Uniform Bills of Lading

<sup>51</sup>N. Y. PENAL LAW §§ 1632, 1632 (a), as amended *supra* note 50.

<sup>52</sup>N. Y. PENAL LAW § 1633, as amended *supra* note 50.

<sup>53</sup>N. Y. CODE CRIM. PROC. § 444; N. Y. LEG. DOC. (1935) 60 (F), p. 4.

<sup>54</sup>N. Y. PENAL LAW § 1633, as amended *supra* note 50.

<sup>55</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (B).

<sup>56</sup>UNIFORM SALES ACT §§ 32, 38 (N. Y. PERS. PROP. LAW §§ 113, 119).

<sup>57</sup>UNIFORM SALES ACT § 38 (N. Y. PERS. PROP. LAW § 119). See also UNIFORM SALES ACT § 32 (N. Y. PERS. PROP. LAW § 113).

Act, and on June 30, 1911, the Uniform Sales Act.<sup>58</sup> Under the Sales Act, as set forth above, a finder or a thief, as against the true owner, could not pass good title, even to a bona fide purchaser for value, to a bill of lading. Under the Bills of Lading Act,<sup>59</sup> however, the true owner could be divested of his title by such transfer, and the Pomerene Interstate Bills of Lading Act was in the same terms.<sup>60</sup> The language with regard to the negotiation of warehouse receipts<sup>61</sup> was similar to the Bills of Lading Act.<sup>62</sup> The conflict existing by virtue of these divergent provisions has raised interesting questions as to what is the prevailing rule in New York.<sup>63</sup> The Conference of Commissioners on Uniform State Laws proposed amendments to make the Sales Act conform to the Bills of Lading Act and the Warehouse Receipts Act.<sup>64</sup> The Law Revision Commission, therefore, proposed to the 1935 Legislature that the following amendments to the Sales Act (as contained in the Personal Property Law) be adopted; the enactment of these statutes has conformed this act to the others:<sup>65</sup>

"§ 113. Who may negotiate a document. A negotiable document of title may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery.

"§ 119. When negotiation not impaired. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, in good faith without notice of the breach of

<sup>58</sup>The UNIFORM BILLS OF LADING ACT was adopted by L. 1911, c. 248; and the UNIFORM SALES ACT by L. 1911, c. 571.

<sup>59</sup>UNIFORM BILLS OF LADING ACT §§ 31, 38 (N. Y. PERS. PROP. LAW §§ 217, 224).

<sup>60</sup>49 U. S. C. A. §§ 110, 117.

<sup>61</sup>UNIFORM WAREHOUSE RECEIPTS ACT §§ 40, 47, as amended by National Conference of Commissioners on Uniform State Laws in August, 1922. N. Y. GEN. BUS. LAW §§ 124, 131 as amended by L. 1924, c. 215.

<sup>62</sup>*Supra* note 59.

<sup>63</sup>See BOGERT, *THE SALE OF GOODS IN NEW YORK* (1912) § 113; 2 WILLISTON, *SALES*, (2nd ed. 1924) § 414.

<sup>64</sup>N. Y. LEG. DOC. (1935) No. 60 (B), p. 10.

<sup>65</sup>(1935) Sen. Int. No. 1236, Pr. No. 1399, passed Senate March 14, 1935, passed Assembly March 20, 1935, approved by Governor March 29, 1935 as L. 1935, c. 337.

duty, or loss, theft, fraud, accident, mistake, duress or conversion."

*Amendment to the Sales Act and the Bills of Lading Act to Add a Definition of Value as Including an Antecedent Debt*<sup>66</sup>

When in 1911 the New York Legislature passed the Uniform Sales Act and the Uniform Bills of Lading Act, it omitted from them the definition of value. Thus the New York rule that an antecedent debt did not constitute value was left unchanged.<sup>67</sup> Nevertheless, New York had adopted in section 51 of its Negotiable Instruments Law the definition of value recommended by the Commissioners on Uniform State Laws:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time."

In the Uniform Warehouse Receipts Act, too, New York adopted the doctrine that value includes an antecedent debt.<sup>68</sup> In the Uniform Fraudulent Conveyance Act,<sup>69</sup> the Uniform Stock Transfer Act,<sup>70</sup> and the Uniform Trust Receipts Act,<sup>71</sup> the definition of value was also given a broader scope.

For these variances within the body of the statutory law of New York, there seemed to be no justification, and the failure to adopt the definition of the Uniform Sales Act and of the Uniform Bills of Lading Act left New York out of step with the law of other states with which commerce is constantly carried on. The Law Revision Commission therefore recommended that the following provision be added to Section 156 (1) of the Personal Property Law (Sales Act):

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as a security therefor."

For the same reason, the following addition to Section 239 (1) of the Personal Property Law (Bills of Lading Act) was proposed:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation whether for

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<sup>66</sup>The recommendations and studies of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (A).

<sup>67</sup>*Coddington v. Bay*, 5 Johns Ch. 54 (N. Y. 1819) *affd.* 20 Johns 637 (N. Y. 1822); N. Y. LEG. DOC. (1935) 60 (A), pp. 9-12, 15-20.

<sup>68</sup>N. Y. GEN. BUS. LAW § 142.

<sup>69</sup>N. Y. DEBTOR AND CREDITOR LAW § 272.

<sup>70</sup>N. Y. PERS. PROP. LAW § 183.

<sup>71</sup>*Cf.* N. Y. PERS. PROP. LAW § 51 (15) with N. Y. PERS. PROP. LAW § 51 (7).

money or not constitutes value where a bill is taken either in satisfaction thereof or as security therefor."

Both of these proposals were embodied in a bill introduced into the Legislature, which has become law.<sup>72</sup>

*Imputation of Contributory Negligence of Parents or Custodians to Infants*<sup>73</sup>

In New York, the negligence of parents or custodians has been heretofore imputed to an infant *non sui juris* so as to bar a recovery for personal injuries by the infant against a third person. This rule had its origin in a dictum in the case of *Hartfield v. Roper*,<sup>74</sup> the first case that enunciated the doctrine in any of the common law jurisdictions. Of all the states in the Union, only three besides New York have adhered to the doctrine.<sup>75</sup> It has been repudiated in England and in at least thirty-five of the United States.<sup>76</sup> Even in New York, the courts, straining to devise limitations and exceptions, have raised a crazy superstructure upon its foundations. One of the limitations was that where the infant had exercised as much care as an adult could reasonably have been expected to exercise, the doctrine of imputed negligence could not be applied.<sup>77</sup> An extreme example of the contortions through which courts have gone to avoid the application of this doctrine can be found in the case of *Kupchinsky v. Vacuum Oil Co.*<sup>78</sup> In this case, the Appellate Division, to avoid a strict application of the doctrine, resorted to the artificiality of dividing into two parts the conduct of the negligent custodian, who was driving the injured child: his conduct as custodian, and his conduct as driver of the vehicle. It held that negligent conduct as a *driver* could not be imputed to the infant. Only negligent conduct as *custodian* could be imputed. The Commission, believing that the doctrine had no founda-

<sup>72</sup>(1935) Ass. Int. No. 386, Pr. No. 2464, substituted for the Commission bill (1935) Ass. Int. No. 1585, Pr. No. 1731, with which it was identical, passed by the Assembly March 13, 1935, by the Senate March 25, 1935, and approved by the Governor April 24, 1935, as L. 1935, c. 455.

<sup>73</sup>The recommendations and study of the Commission were published as N. Y. LEG. DOC. (1935) No. 60 (C).

<sup>74</sup>21 Wend. 615 (N. Y. 1839).

<sup>75</sup>N. Y. LEG. DOC. (1935) No. 60 (C), p. 3. For collection of cases see N. Y. LEG. DOC. (1935) No. 60 (C), pp. 27-28, n. 31.

<sup>76</sup>For collection of cases, see N. Y. LEG. DOC. (1935) No. 60 (C), pp. 28-42, n. 32-34.

<sup>77</sup>*Ihl v. Forty-Second St. etc. R. R. Co.*, 47 N. Y. 317 (1872). For collection of cases, see N. Y. LEG. DOC. (1935) No. 60 (C), pp. 18-22, n. 17.

<sup>78</sup>263 N. Y. 128, 188 N. E. 278 (1933) *affirming* 238 App. Div. 457, 265 N. Y. Supp. 186 (2nd Dept. 1933).



tion in logic or policy, recommended that article 5 of the Domestic Relations Law be amended by adding the following new section, which became law:<sup>79</sup>

"Section 73. *Negligence of parent or other custodian not imputed to infant.* In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant."

*Uniform Criminal Extradition Act*<sup>80</sup>

Interstate crime has become a problem of baffling proportions. The combined forces of the several states and the federal government have found it difficult to cope with organized gangs operating from a base over a radius of many states. The framers of the Federal Constitution contemplated the need of cooperation among states to assist each state in the enforcement of its criminal laws. For this purpose, Article IV, section 2, of the Federal Constitution directed:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from justice and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

Judicial interpretation of this provision as well as of the relevant federal statutes confined the operation of the law of extradition to those accused persons who had been in the demanding state at the time of the commission of the alleged crime. Thus the term "fugitive from justice" was given a restricted meaning. The modern exigencies of the crime problem necessitate a broadening of the class of extraditable persons. For this purpose, and also to introduce uniformity in this field, the Conference of Commissioners on Uniform State Laws framed the Uniform Criminal Extradition Act. The proposed uniform act was the basis of studies by the Law Revision Commission for revision of the New York procedure relating to extradition. The Law Revision Commission proposed a bill substantially in the same form as the uniform act. In the main, the present New York practice was retained. One of the most important innovations, however, was contained in the proposed section 834 of the Code of Criminal Procedure which would have permitted the extradition of an accused even though he was not within the demanding state at the time of the

<sup>79</sup>(1935) Ass. Int. No. 1912, Pr. No. 2131, passed Assembly March 20, 1935, passed Senate April 9, 1935, approved by Governor May 8, 1935 as L. 1935, c. 796.

<sup>80</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (D).

perpetration of the crime. The constitutionality of this provision has been questioned,<sup>81</sup> on the ground that Article IV, section 2, of the Federal Constitution states the maximum limit of the power of extradition both for federal and state statutes. Proponents of the Uniform Act hold that the framers of the Constitution did not intend to restrict cooperation among the states to the particular situation envisaged in the Constitution.

The bill proposed by the Law Revision Commission contained two additional sections not found in the original draft proposed by the Commissioners on Uniform State Laws. One of these would permit the extradition of a person, as a fugitive from justice, who *involuntarily* left the demanding state and is found within New York. The situation contemplated might have arisen in the Hauptmann case, had the New Jersey court acquitted Hauptmann and New York demanded his return.<sup>82</sup> Under the present law there is some question as to whether extradition may be obtained by a state which itself has previously extradited the person sought. Another change would permit an agreement by the Governor of New York to extradite a prisoner for trial on a charge punishable by death or life imprisonment, on condition that the demanding state agree to return the person to New York if he is acquitted or sentenced to lesser punishment. These proposals of the Commission, however, have failed to become law.<sup>83</sup>

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<sup>81</sup>N. Y. LEG. DOC. (1935) No. 60 (E), pp. 12-13. See *Report of Committee on Legislation of New York County Lawyers Association*, March 7, 1933, reporting on (1933) Ass. Int. No. 353, Pr. No. 354.

<sup>82</sup>N. Y. LEG. DOC. (1935) No. 60 (D), pp. 5, 57-58.

<sup>83</sup>(1935) Ass. Int. No. 1586, Pr. No. 1732, passed Assembly March 11, 1935, passed Senate April 2, 1935. The bill, however, was disapproved by the Governor with the following veto message:

"This bill would amend the code of criminal procedure by repealing the present provisions relating to extradition and enacting in lieu thereof the so-called uniform criminal extradition act with certain modifications.

"This bill in general codifies existing law. It contains, however, one radical departure. It permits the extradition of a person who was not actually in the demanding state at the time of the alleged commission of the crime. This provision is found in Section 834 of the bill which reads:

"'Extradition of persons not present in demanding state at time of commission of crime. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section eight hundred and thirty-two with committing an act in this state or in a third state intentionally resulting in a crime in the state whose executive authority is making the demand; and the provisions of this title, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime and had not fled therefrom.'

"I realize, of course, the good purpose that is sought to be achieved by the provisions of this section, namely, the apprehension, trial and conviction of real criminals. At the same time, however, I fear that the section is open to the strong possibility of serious misuse and abuse. It might readily curtail

*Recovery of Damages from Third Person for Injuries to Real Property When the Ownership of the Real Property is Divided Between Owners of One Present and One or More Future Interests*<sup>84</sup>

Under the former law of New York, a trespasser upon real property might have been subjected to separate suits brought against him by owners of possessory interests and owners of future interests.<sup>85</sup> It was true also that the owner of the possessory interest might perhaps have recovered the full damage inflicted on the fee simple ownership of the affected land,<sup>86</sup> but no adequate method of supervision of the fund thus collected existed.<sup>87</sup> It seemed unreasonable to bar the reversioner from his action by such suit of the tenant, without requiring the joinder of the reversioner as a party to the suit. Finally, in the event of separate suits brought by both reversioner and tenant, it seemed likely that the trespasser would be forced to pay damages really in excess of his wrong.<sup>88</sup>

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freedom of speech and of the press and be the basis of persecution. Additional study should be given to this particular aspect of the problem.

"I regret that it is necessary to disapprove the many beneficial provisions of the bill merely because of the implications of Section 834. But during the next session of the Legislature I trust that another bill, containing proper safeguards, will be passed.

"The bill is disapproved.

(Signed) HERBERT H. LEHMAN"

<sup>84</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (G). The studies contained in N. Y. LEG. DOC. (1935) No. 60 (G) were prepared under the direction of the Commission by Richard R. Powell, Professor of Law, Columbia University. The study of this subject is printed at pp. 37-44.

<sup>85</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 38-39, n. 8 and 9. See N. Y. REAL PROPERTY LAW § 531.

<sup>86</sup>*Rogers v. Atlantic Gulf and Pacific Co.*, 213 N. Y. 246, 107 N. E. 661 (1915) discussed in N. Y. LEG. DOC. (1935) No. 60 (G), pp. 39-40, n. 10.

<sup>87</sup>N. Y. LEG. DOC. (1935) No. 60 (G), p. 41 points out that nothing appears in the appellate record or in the opinion in the *Rogers* case to show what, if any, protection of the rights of the remainderman was made. See also N. Y. LEG. DOC. (1935) No. 60 (G), pp. 39-40, n. 12.

<sup>88</sup>See N. Y. LEG. DOC. (1935) No. 60 (G), pp. 43-44 as follows:

"When one or more of the persons thus suing separately has an estate for life there is a further danger to the defendant. In determining the share of damages recoverable by the owner of an estate for life, the duration of this estate for life is a most important factor. Evidence as to this duration cannot be other than evidence as to probabilities. To whatever extent actuarial data are received and relied upon in computing the proper damages to be awarded, the future course of events may depart widely from the probabilities used as a basis of the award. Thus if A has damaged the fee simple ownership of Blackacre to the extent of \$5,000 and Blackacre is owned by B, a life tenant aged 30, and by C who has a remainder in fee simple absolute, in the absence of unusual circumstances, B would be entitled in his separate action to recover 76.86 per cent of the \$5,000 or a total of \$3,843. Now let us suppose

To meet the situation, the Law Revision Commission proposed to the Legislature two bills which were enacted.<sup>89</sup> The first of these added to the Real Property Law a new section 538 to read as follows:

*"Recovery of fee damages by the owner of a possessory estate for life or for years. When the ownership of land is divided into a possessory estate for life or for years and one or more future interests, and a person having none of these interests causes damage to such land, the damages recoverable by the owner of such possessory interest from the wrongdoing third person may include damages caused to interests in the affected land other than those owned by parties to the action or proceeding when, but only when, all living persons who have either a possessory or a future interest in the affected land are parties thereto. The court in which any such recovery of damages occurs shall make such direction for the distribution of the damages recovered among the persons who are parties to the action or proceeding and for the protection of the interests of persons who are not parties thereto, as justice may require."*

The second of these amended the Civil Practice Act to make effective the provisions of the new section 538 of the Real Property Law, by adding the following new subdivision to Section 193 of the Civil Practice Act:

*"When the ownership of real property is divided into a possessory and one or more future interests; and a third person is claimed to have caused damage to such real property; and an*

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that B has obtained his judgment and the wrongdoer A has paid it in full. The next day B is killed in a street accident. C, who has thus far done nothing, becomes entitled to possession of Blackacre and thereby learns of A's conduct. When C's suit is tried, the duration of B's estate for life is no longer a future problem. Facts show it to be short and the damage to C's interest to be almost the whole of the \$5,000. Thus conceivably A can be compelled to pay close to \$8,800 instead of the \$5,000.

"The law is not generally over-worried about a wrongdoer being subjected to multiple bills of costs or to the risk that several partial verdicts will exceed in amount a single complete verdict. These factors are here supplemented by the further danger of excessive liability due to the difficulty of proof as to the duration of life interests. Consequently it would seem reasonable to permit a defendant in any action brought to recover damages to land, the ownership of which is split between the owner of a present interest and one or more future interests, to require the joinder of those living persons other than the plaintiff who have any one of these other interests, so that the defendant's total liability can be determined at one time."

<sup>89</sup>The bill to amend the REAL PROPERTY LAW was (1935) Sen. Int. No. 1598, Pr. No. 1868. It was amended and passed in Senate April 9, 1935, and as amended passed Assembly April 12, 1935. It was approved by the Governor on May 8, 1935 as L. 1935, c. 794. The bill to amend the CIVIL PRACTICE ACT was (1935) Ass. Int. No. 1914, Pr. No. 2133. It was passed by the Assembly March 19, 1935, and amended in the Senate and passed April 9, 1935, and the amendments were concurred in by the Assembly April 11, 1935. It was approved by the Governor on May 8, 1935 as L. 1935, c. 798. These acts are made effective on September 1, 1935.

action or proceeding is pending in which less than all the owners of such real property seek to recover the damages so caused to their several or aggregated interests; and a person alleged to be responsible for such damage makes application to the court to have all living persons who have an interest present or future in the affected real property made parties to such action or proceeding, the court must grant the application and direct such additional parties to be brought in by the proper amendment, but the expense made necessary to accomplish the additional joinders can be allocated to the applicant or to such other persons as to the court shall seem proper. Any person thus made a party to the action or proceeding shall be precluded from recovering the damages, if any, caused to his interest in such real property by conduct of the person on whose application he was made a party otherwise than in such action or proceeding. If damages are recovered in such an action or proceeding, the court shall make such direction for the distribution of the damages recovered among the persons who are parties to the action or proceeding and for the protection of the interests of persons who are not parties thereto, as justice may require."

Both of these amendments provide that the court shall make such direction as justice may require for the distribution of the damages recovered among the persons who are parties to the action or proceeding and for the protection of the interests of persons who are not parties thereto.

### *Treble Damages in Actions for Waste*<sup>90</sup>

Sections 524 and 525 of the New York Real Property Law perpetuated the old Statute of Gloucester, enacted in England in 1278. These provisions declared that, in an action for waste, a person may be liable for treble damages and forfeiture of his possessory interest in the land upon which the act of waste was committed. Research revealed that the Statute of Gloucester had not been used in England over a period of fifty years, that it was repealed in effect in 1833, and in fact in 1879.<sup>91</sup> Generally, when treble or punitive damages are allowed, some element of malice or reprehensible tortious conduct is involved.<sup>92</sup> The Commission concluded that there was no public policy to sustain the ancient rule and that it was incompatible with the general rules of damages in actions for injuries to property. The Commission recommended, therefore, that only compensatory damages should be allowed in the action for waste, and that for-

<sup>90</sup>The supporting study is presented in N. Y. LEG. DOC. (1935) No. 60 (G), pp. 62-76.

<sup>91</sup>N. Y. LEG. DOC. (1935) No. 60 (G), p. 63.

<sup>92</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 65-69 gives a collection of statutes with comment.

feiture of the possessory interest should be permitted only when the resulting damage equals or exceeds the value of the possessory interest. This bill was passed by the Legislature and signed by the Governor.<sup>93</sup>

*Alteration of Premises as Waste; Ameliorating Waste*<sup>94</sup>

Originally at common law, it was waste for a tenant in possession to alter in any manner the subject of his tenancy.<sup>95</sup> New York modified the common law rule by declaring it permissible for a tenant in possession to cut down trees upon his land when good husbandry made it advisable.<sup>96</sup> The common law was further modified by permitting a tenant to change the course of a stream upon his land in the interests of good husbandry.<sup>97</sup> Later, the New York Court of Appeals held that the tenant in possession could erect buildings upon unimproved realty.<sup>98</sup> Despite these advances, however, the courts refused to change the common law of waste in two situations of extreme importance in the modern development of real property. Tenants of realty upon which structures had been erected could not make structural changes dictated by contemporary necessities,<sup>99</sup> nor could tenants remove outmoded structures to erect new buildings.<sup>100</sup> These rules make it possible for remaindermen or reversioners to withhold consent to any change in the structures, for the purpose of forcing exorbitant payments from tenants.

To remedy this defect, the Law Revision Commission proposed, and the Legislature passed, the following new section 537 of the Real Property Law:

*"Alterations or replacements of structures by persons having estate for life or years. When land is in the possession of a person having an estate for life or for years therein, and such person proposes to make an alteration in or replacement of a structure or*

<sup>93</sup>(1935) Ass. Int. No. 1913, Pr. No. 2132, passed Assembly March 19, 1935, passed Senate March 25, 1935, and was approved by the Governor on May 8, 1935 as L. 1935, c. 797.

<sup>94</sup>The supporting study is printed in N. Y. LEG. DOC. (1935) No. 60 (G), pp. 45-61.

<sup>95</sup>N. Y. LEG. DOC. (1935) No. 60 (G), p. 47.

<sup>96</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 52-53.

<sup>97</sup>N. Y. LEG. DOC. (1935) No. 60 (G), p. 54.

<sup>98</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 54-55, n. 38. See N. Y. O. and W. R. v. Livingston, 238 N. Y. 300, 144 N. E. 501 (1924).

<sup>99</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 55-57.

<sup>100</sup>N. Y. LEG. DOC. (1935) No. 60 (G), pp. 57-59, analyzing *Brokaw v. Fairchild*, 135 Misc. 70, 237 N. Y. Supp. 6 (1929), *aff'd. without opinion*, Finch J. dissenting in strong opinion, 231 App. Div. 704, 245 N. Y. Supp. 402 (1930), *aff'd. without opinion* 256 N. Y. 670 (1931).

structures thereon, and the proposed alteration or replacement is one which a prudent owner of an estate in fee simple absolute in the affected land would be likely to make in view of the conditions existing on and in the neighborhood of the affected land; then the owner of a future interest in such land can neither recover damages for, nor enjoin the alteration or replacement without establishing one or more of the following facts:

"1. That the proposed alteration or replacement, when completed, will reduce the market value of the future interest of complainant; or

"2. That the person proposing to make the alteration or replacement refuses adequately to protect the complainant by the giving of security against a cessation of the proposed work prior to its completion and against responsibility for expenditures incident to the making of the proposed new construction; or

"3. That the proposed alterations or replacement are in violation of the terms of some agreement or other instrument regulating the behavior of the owner of the estate for life or for years or restricting the land in question."

These proposals failed to become law for lack of the Governor's approval.<sup>101</sup>

#### *Section 230 of the Correction Law*<sup>102</sup>

Little known to the ordinary citizen is the Correction Law dealing with the treatment of prisoners. Section 230 of the Correction Law makes provision for reduction of prison sentences when good behavior or good work of prisoners so warrants, a policy embodied in the law since 1817.<sup>103</sup> Article 9 of the Correction Law, however, of which

<sup>101</sup>(1935) Ass. Int. No. 1910, Pr. No. 2129, passed Assembly March 20, 1935, passed Senate March 25, 1935. This bill was disapproved by the Governor on May 8, 1935 with the following memorandum:

"This bill provides that a tenant for life or for years may make an alteration in or replacement of a structure on the land, if such alteration or replacement is such which a prudent owner would be likely to make in view of the existing conditions. The bill also prevents the owner of the future interest in the land from recovering damages or preventing the alteration or replacement unless he can prove that it will reduce the market value of his interest, or that the person proposing to make the alteration or replacement has refused adequately to secure the completion of the work and its payment, or that the proposed changes are in violation of an express agreement.

"The provisions of this bill practically reverse existing law.

"I am in complete sympathy with the purpose that this bill seeks to achieve. However, I have grave doubt as to the wisdom of placing the burden of proof upon the person who has an interest in the property but who, at the time, is not in possession; and likewise as to whether the bill should apply to all tenancies for years without regard to duration. I regret that because of this I am compelled to veto the bill.

"The bill is disapproved.

(Signed) HERBERT H. LEHMAN"

<sup>102</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (I).

<sup>103</sup>L. 1817, c. 269.

section 230 is a part, was enacted substantially in its present form by the laws of 1886.<sup>104</sup> Section 230 at that time was a simple, compact provision containing graduated reductions depending on the length of the sentence. Since 1886, section 230 has undergone many changes. These amendments, never retroactive in application, were made applicable only to those entering prison subsequent to each amendment. The result was a stratification of prisoners into various classes, the limits of which were determined by the dates of the changes. Thus different provisions of the law making different allowances of time applied to each of these classes, so that a prisoner in one group did not receive the same reduction as prisoners in other groups. In 1934, an attempt at a comprehensive restatement of the benefits of section 230 introduced greater confusion.<sup>105</sup> Because of phrasing which seemed to make benefits cumulative, exorbitant expectations were aroused on the part of the prisoners.<sup>106</sup> Some of these expectations were, in fact, realized by decisions of the courts and rulings of the Attorney-General.<sup>107</sup> The constitutional prohibition against *ex post facto* legislation raised a problem in any attempt at revision. Although the application of "good time" statutes could be considered simply advisory to the governor in the exercise of his constitutional power of pardon and commutation, still there is some authority both in New York and elsewhere for the proposition that prisoners were entitled to appropriate good time allowances provided the conditions of the statute were met. Regardless of the constitutional question, however, the practical necessities of prison discipline demanded a prompt and fair solution of the difficulties presented by the patchwork amendments to section 230.<sup>108</sup> The Governor, therefore, requested the Law Revision Commission to consider this problem and to report its recommendations to him. The Law Revision Commission, accordingly, proposed to the Governor a statute which he referred to the Legislature with his message.

This bill emphasized the fact that "good time" allowances are simply an aid to the Governor in the exercise of his constitutional power of pardon and commutation. The principal changes proposed by the Law Revision Commission are as follows:

*"Definite sentence; indeterminate sentence; discretionary reduction of sentence. 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence*

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<sup>104</sup>L. 1886, c. 21.

<sup>105</sup>L. 1934, c. 731. See N. Y. LEG. DOC. (1935) No. 60 (I), pp. 18-22.

<sup>106</sup>N. Y. LEG. DOC. (1935) No. 60 (I), pp. 3, 18-22.

<sup>107</sup>N. Y. LEG. DOC. (1935) No. 60 (I), pp. 20-21, 87.

<sup>108</sup>N. Y. LEG. DOC. (1935) No. 60 (I), pp. 4, 46-47.



to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.

"2. Every prisoner confined in a state prison or penitentiary may in the discretion of the governor as hereinafter provided receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction."

Certain changes in other sections of the Correction and Penal Laws were made necessary because of the adoption of new terminology.<sup>109</sup> The entire proposal of the Commission became law.<sup>110</sup>

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In addition to these proposals, passed by the legislature, the Commission proposed two bills which passed the Senate but failed to be reported out of committee in the Assembly. One would adopt for construction of deeds the same principle of implication of cross remainders now applied to wills.<sup>111</sup> Another proposal, seeking to accomplish what has been characterized as the "liquidity of land",<sup>112</sup> aimed to liberalize those sections of the real property law prescribing the procedure for the sale, lease or mortgage of real property held in trust or subject to future interests.<sup>113</sup>

### III

#### STUDIES NOT LEADING TO LEGISLATION

In addition to the recommendations outlined in the preceding pages which resulted in bills presented to the legislature, the Commission undertook certain studies not resulting in proposals for change.

<sup>109</sup>The principal change in terminology was the substitution of the phrase "discretionary reduction of sentence" for the old terms "commutation or diminution of sentence", "compensation or diminution of sentence", "compensation," and "commutation".

<sup>110</sup>Ass. Int. No. 1909, Pr. No. 2128, passed Assembly April 2, 1935, passed Senate April 18, 1935, approved by the Governor May 14, 1935 as L. 1935, ch. 902.

<sup>111</sup>The supporting study of the Commission is printed in N. Y. LEG. DOC. (1935) No. 60 (G), pp. 77-86.

<sup>112</sup>Powell, *The Liquidity of Land* (1925) 25 COL. L. REV. 989.

<sup>113</sup>The supporting study of the Commission is printed in N. Y. LEG. DOC. (1935) No. 60 (G), pp. 11-36.

In certain of these projects, the Commission reached the conclusion that no change was desirable. Its study of the doctrine of incorporation by reference as applied to wills was among these. The general rule in England and the United States has been thus expressed:

"If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such."<sup>114</sup>

Although the New York courts have expressed certain doubts as to the general operation of the doctrine, the Commission concluded that clarification of the problem could best be left to the courts and that legislation was not desirable.<sup>115</sup>

In response to a suggestion by a member of the bar, the Commission undertook to study section 83 of the Decedent Estate Law to ascertain the adequacy of remedies for the evaluation of realty in the distribution of estates. Whether the spouse alone takes or whether other distributees are entitled to a share may, of course, depend on the value of the realty. The study made under the Commission's direction disclosed that there were at least four possible procedures already available in the New York practice for this purpose.<sup>116</sup>

The subject of an infant's right to recover for prenatal injuries has been a storm center in legal literature.<sup>117</sup> In New York, the case of *Drobner v. Peters*,<sup>118</sup> denying a recovery to an infant for injuries received while *en ventre sa mere*, has been the focal point of this discussion. After study of the problem, the Commission decided to make no recommendation for legislation.

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<sup>114</sup>Gray, C. J., in *Newton v. Seaman's Friend Society*, 130 Mass. 91 (1881).

<sup>115</sup>The supporting study of the Commission is N. Y. LEG. DOC. (1935) No. 60 (G), pp. 87-104. See especially p. 104.

<sup>116</sup>The supporting study of the Commission is N. Y. LEG. DOC. (1935) No. 60 (J). See especially pp. 6-12, discussing the statutory action to compel the determination of a claim to real property (N. Y. REAL PROPERTY LAW §§ 500-512), the procedure provided by § 242 of the N. Y. SURROGATE'S COURT ACT, the procedure provided by statute, called "probate of heirship" (N. Y. SURROGATE'S COURT ACT §§ 311-313), as well as an action of ejectment.

<sup>117</sup>See collection of legal periodical literature contained in N. Y. LEG. DOC. (1935) No. 60 (H), pp. 26-28, n. 75.

<sup>118</sup>232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921) reversing 194 App. Div. 696, 186 N. Y. S. 278 (1st Dept. 1921).

On another category of work undertaken by the Commission, consisting of projects not completed before the end of the 1935 session of the legislature, no definite commentary beyond mere mention can now be made. The New York law as to contribution among joint tortfeasors<sup>119</sup> and the procedure with regard to the production of expert testimony<sup>120</sup> are subjects within the class of unfinished business. Likewise a thorough study of the statutes of limitations is in progress.<sup>121</sup> Among the matters being considered in this latter field are the rules relating to the extension of the limitation period because of disabilities, and the provisions regarding nonresidents and tolling. A complete fundamental examination of the doctrine of consideration and of the seal is also being made.<sup>122</sup> Finally, the Law Revision Commission is making a study of the necessities for reform of the Penal Law.<sup>123</sup> Not only among students of the subject and those immediately interested in the criminal law and its enforcement, but also in the public at large, there is growing opinion that a thoroughgoing revision of the Penal Law of New York is long overdue.<sup>124</sup> The Law Revision Commission, responsive to this general feeling, is making a long term exploratory study of this part of the law.

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The Commission's work has also taken another course that promises additional valuable public service. Several studies have been made by the Commission directly at the request of the Governor. The work done on the revision of section 230 of the Correction Law, to which reference has already been made,<sup>125</sup> illustrates this type of

<sup>119</sup>N. Y. LEG. DOC. (1935) No. 60, p. 11.

<sup>120</sup>N. Y. LEG. DOC. (1935) No. 60, p. 11.

<sup>121</sup>N. Y. LEG. DOC. (1935) No. 60, pp. 11-12.

<sup>122</sup>N. Y. LEG. DOC. (1935) No. 60, p. 13. It is interesting to note that by L. 1935, c. 708 (effective Sept. 1, 1935) § 342 of the CIVIL PRACTICE ACT was amended to read as follows:

§342. Seal on written instrument as evidence of consideration. A seal upon a written instrument hereafter executed shall not be received as conclusive, or presumptive evidence of a sufficient consideration. A written instrument, hereafter executed, which inodifies, varies or cancels a sealed instrument, executed prior to the effective date of this section, shall not be deemed invalid or ineffectual because of the absence of a seal thereon."

<sup>123</sup>N. Y. LEG. DOC. (1935) No. 60, p. 12. See also N. Y. LEG. DOC. (1934) No. 50, pp. 45-48 for the recommendations of the Commission on the Administration of Justice. See also N. Y. LEG. DOC. (1934) No. 50 (Q), (R), (S) for work done under the direction of that Commission. See also MacDonald, *The Classification of Crimes* (1933) 18 CORNELL LAW QUARTERLY 524.

<sup>124</sup>See Presentment of New York County Grand Jury of May 1934, N. Y. Times Jan. 21, 1935. See also President Roosevelt's letter to the 1935 meeting of the American Law Institute, N. Y. Times, May 10, 1935.

<sup>125</sup>*Supra*, pp. 436-438.

service. On request of the Governor, a thorough study was also made of certain proposals seeking to effect innovations in the procedure for appointing lunacy commissions.<sup>126</sup> These proposals had been embodied in bills introduced into the Legislature in 1933 and 1934.<sup>127</sup> The gist of one of these proposals was that each lunacy commission appointed pursuant to the provisions of the Code of Criminal Procedure should include a "qualified psychiatrist". Another of these proposals related to enacting a suitable definition of the term "qualified psychiatrist" as well as providing a method for registering this class of medical experts. The Commission decided that a change in the law along the line of this last proposal was desirable. Investigation, however, disclosed grave practical difficulties, making it inadvisable to *require* the appointment of "qualified psychiatrists" on all lunacy commissions. For one thing, such mandatory statute would impose a hardship upon rural communities in which it might be difficult to obtain the services of a psychiatrist.<sup>128</sup> As a matter of policy, too, there was objection to that part of the proposal which would permit the use of psychiatrists connected with institutions in which the subject had been confined.<sup>129</sup>

The Commission was also asked by the Governor to consider the possibility of reinforcing the provisions of Section 722, subdivision 11, of the Penal Law, commonly known as the "public enemy act". Widespread discussion in the press<sup>130</sup> and much public interest was aroused by this matter. The present provisions of the "public enemy act" declare that a misdemeanor has been committed when a person "bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts".<sup>131</sup> The proponents of a more drastic "public enemy" law maintained that the requirement of "unlawful purpose" made Section 722 unenforce-

<sup>126</sup>The recommendations and study of the Commission are published as N. Y. LEG. DOC. (1935) No. 60 (L).

<sup>127</sup>(1934) Sen. Int. No. 1662, Pr. No. 1938; (1933) Sen. Int. No. 623, Pr. No. 638.

<sup>128</sup>N. Y. LEG. DOC. (1935) No. 60 (L), pp. 29-30.

<sup>129</sup>N. Y. LEG. DOC. (1935) No. 60 (L), pp. 30-31.

<sup>130</sup>See editorials in N. Y. World Telegram, Feb. 11, 1935; N. Y. Herald Tribune, Feb. 28, 1935; N. Y. Times, Review of the Week, Mar. 3, 1935; N. Y. Post, April 10, 1935; N. Y. L. J., Dec. 26, 27, 1934 at 2556, 2574. See also Correspondence in N. Y. L. J., Mar. 5, 1935 at 1130; N. Y. LEG. DOC. (1935) 60 (K), p. 36.

<sup>131</sup>This act is subdivision 11 of § 722 of N. Y. PENAL LAW, which reads:

"§ 722. Disorderly Conduct. Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct. . .

"11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts."

able. Several schemes of amendment were put forward. The effect of each of these would have been to circumvent the "unlawful purpose" requirement or eliminate it.<sup>132</sup> The Commission, however, took the broad stand that any such legislation was highly undesirable for reasons both of constitutionality and of public policy. It affirmed its belief that there was no short cut to the proper enforcement of the criminal law,<sup>133</sup> in the arrest and prosecution of persons for serious crimes which they are "known" to have committed.

#### IV

#### CONCLUSION

The bound studies<sup>134</sup> of the Commission are the published record of its achievement. It is a record that should be of great value in the explanation of the new laws adopted on the Commission's recommendation. Not only has the Commission illustrated that it may be a medium for effecting "demands not yet articulate";<sup>135</sup> it has opened a broad vista of what may be achieved by thorough, disinterested, continuous, scholarly study of the legal structure.

<sup>132</sup>N. Y. LEG. DOC. (1935) No. 60 (K), pp. 27-33.

<sup>133</sup>N. Y. LEG. DOC. (1935) No. 60 (K), p. 5. See also entire recommendations and supporting study printed in N. Y. LEG. DOC. (1935) No. 60 (K). A public enemy bill, however, Ass. Int. No. 463, Pr. No. 473, 2976, was passed by the Legislature, effective for one year only, and was signed by the Governor on May 15, 1935 as L. 1935, c. 921, with the following memorandum:

"This bill amends Section 722 of the Penal Law which relates to disorderly conduct. The amendment adds a provision that in any prosecution the fact that the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals, shall be prima facie evidence that such consorting was for an unlawful purpose.

"Concerning the provisions of this bill, there is a sincere difference of opinion. Some contend that the bill is unconstitutional; others that it is constitutional. Many police commissioners and prosecutors assert that the bill would be very effective in aiding them in enforcing the provisions of Section 722. Others state it would be of little value in prosecution. Still others believe that the provisions of the bill are open to the danger of serious abuse.

"The fact is that this bill will remain in effect for only one year. I think it is reasonable that we should have an actual trial of the practical application of the provisions of this bill."

<sup>134</sup>Printed in N. Y. LEG. DOC. (1935) No. 60, 60 (A) to (L). By joint resolution of the legislature, these studies will comprise one bound volume entitled REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION, 1935.

<sup>135</sup>*Supra* note 11.